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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 817

C. T. Loo, Trustee in Dissolution, for the Creditors and Stockholders of C. & M. McCarthy, Ltd., a Dissolved Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit, entered on October 10, 1957.

OPINIONS BELOW.

The opinion of the District Court (R. 31-36), printed in Appendix B hereto, *infra,* p. xi, is unofficially reported in 56-2 U.S.T.C., para. 9700. The opinion of the Court of Appeals (R. 48-52) printed in Appendix B hereto, *infra,* p. xvii, is reported at 248 F. 2d 765.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 10, 1957 (No. 15,237) (R. 53) and is printed in Appendix C hereto, *infra,* p. xxiv. An order granting an extension of time within which to petition for a writ of certiorari to and including March 8, 1958, was entered on January 7, 1958, and is printed in Appendix D hereto, *infra,* p. xxv. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Whether a corporation, which has been dissolved and is no longer in existence pursuant to the laws of its domicile, can be taxed on income to a trustee for the creditors and stockholders of the dissolved corporation.

2. Whether Treasury Regulations 111, Sec. 29.22 (a)-20 is applicable to the trustee for creditors and stockholders of a dissolved corporation which no longer exists.

STATUTES AND FEDERAL REGULATIONS INVOLVED.

The statutes involved are the Internal Revenue Code of 1939, Secs. 22(a) and 52(a) (26 U.S.C. 1952 ed., Secs. 22(a) and 52(a)); and Revised Laws of Hawaii 1945, Secs. 8352, 8354, 8355, 8356 and 8357. The regulations involved are Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939, Sec. 29.22(a)-20, Sec. 29.52-1, Sec. 29.52-2. The pertinent portions of the foregoing are printed in Appendix A, *infra*, pp. i-x.

STATEMENT.

C. & M. McCarthy, Limited, a Hawaii corporation, owned and operated two properties in Honolulu, the Donna Hotel and the Waikiki Apartments. On October 31, 1944, several individuals, including C. T. Loo, offered to purchase the hotel for $325,000. The corporation rejected the offer, but its stockholders offered to sell all of the corporation stock for $400,000. The purchasers (realizing that the value of the Waikiki Apartments was approximately $75,000) accepted the offer. The sale of the stock was completed on January 23, 1945, and the purchasers became the directors and officers of the new corporation (R. 24, 25).

On January 23, 1945, the new stockholders voted to dissolve the corporation as of the close of business on February 15, 1945. A petition for dissolution was filed with the Treasurer of the Territory of Hawaii pursuant to Revised Laws of Hawaii 1945, Sec. 8352 *et seq.*, with the request that C. T. Loo be appointed

trustee for the creditors and stockholders upon dissolution. The Treasurer issued his decree of dissolution dissolving the corporation as of the close of business on February 15, 1945, and appointed C. T. Loo trustee for the creditors and stockholders of the dissolved corporation (R. 20, 21).

After the corporation was dissolved, title to its assets, including the property known as the Waikiki Apartments, was vested in C. T. Loo as trustee. As such trustee, he sold the Waikiki Apartments on February 19, 1945, to Hun Yun Yei for $75,000 (R. 21, 25). The adjusted cost basis of the Waikiki Apartments to the dissolved corporation had been $20,849.30 (R. 26).

Petitioner erroneously filed a corporate income tax return on behalf of the corporation for the period from January 1, 1945, to August 31, 1945, when the trust was terminated and distribution made (R. 21, 26). In the return he did not report the sale of the Waikiki Apartments (R. 22). The Bureau of Internal Revenue, on examining the return, included the "gain" from the sale and assessed a capital gains tax of $13,173.20 against C. & M. McCarthy, Limited. Petitioner paid the tax with interest to June 15, 1950 amounting to $16,795.83 (R. 22).

On May 15, 1952, petitioner claimed a refund of the $16,795.83 plus interest. The District Director of Internal Revenue disallowed the claim on August 31, 1953, and on August 24, 1955, petitioner brought this action under the provisions of 28 U.S.C., Sec. 1346, and Internal Revenue Code of 1954, Sec. 7422.

The District Court entered judgment in favor of petitioner (R. 41-42) on the ground that the corporation was no longer in existence and not subject to tax at the time the Waikiki Apartments were sold (R. 34-36). The United States appealed to the Court of Appeals on July 16, 19[illegible] (R. 36, 37).

The Court of Appeals reversed the judgment of the District Court. It accepted the District Court's holding that in Hawaii corporate existence terminates upon dissolution, but held that Treasury Regulations 111, Sec. 29.22(a)-20 applied to all trustees in dissolution whether or not corporate existence terminates upon dissolution.

The Court noted that the first sentence of the regulation is aimed at what *usually* happens in most jurisdictions upon dissolution, but stated that the second and third sentences of the regulation are independent of the first. Concerning the second sentence, the Court interpolated "[by the Commissioner of Internal Revenue . . . hold irrespective of local law that) (t)he corporate existence is continued for the purpose of liquidating the assets and paying the debts. . . ." The Court held that the third sentence of the regulation stood on its own feet and the recitals in the first and second sentences would not vitiate its "plain meaning" (R. 48-52).

REASONS FOR GRANTING THE WRIT.

I. THE DECISION IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The decision of the Court below directly conflicts with the decision in *Cold Metal Process Co. v. Commissioner of Internal Revenue,* 247 F. 2d 864 (6th Cir. 1957). In that case the court held that upon dissolution of a corporation under the Ohio corporation law, the corporation was not in existence in 1949 for Federal income tax purposes. The court said:

> . . . Income tax liability is statutory. We find no Federal statute which requires a non-existing taxpayer to file an income tax return or which imposes an income tax liability for a certain year upon a so-called taxpayer who was not in existence during that taxable year. (p. 874.)

The court reversed a judgment of the Tax Court which adjudged an income tax deficiency for 1949 against The Cold Metal Process Company and an identical judgment against the trustee in dissolution as a transferee of the corporation. cf: *Howell Turpentine Co. v. Commissioner of Internal Revenue,* 162 F. 2d 319 (5th Cir. 1947). in which the court said:

> . . . The government did not have any right to this tax unless the sale was made by the corporation. If it was not so made, the government had no right to the tax. . . . (p. 324.)

In the present case, the sale by the petitioner was not made for or on behalf of the corporation, but for the stockholders after corporate existence terminated. After dissolution, the corporation retained no

assets; everything passed to the petitioner as trustee. Petitioner had no power to act for the corporation.

In *U.S. v. Cumberland Public Service Co.*, 338 U.S. 451, 94 L. Ed. 251, 70 S. Ct. 280 (1950), this Court held that after dissolution, where a sale of property was not made by a corporation, the gain is not taxable to the corporation. Similar holdings were made in *Wurtsbaugh v. Commissioner of Internal Revenue*, 187 F. 2d 975 (5th Cir. 1951); *United States v. Cummins Distilleries Corporation*, 166 F. 2d 17 (6th Cir. 1948); *Novo Trading Corporation v. Commissioner of Internal Revenue*, 113 F. 2d 320 (2d Cir. 1940); *Telephone Directory Advertising Co. v. United States*, 142 F. Supp. 884 (Ct. Cl. 1956); *Herbert v. Riddell*, 103 F. Supp. 369, 382-384 (D.C. Cal. 1952); and *Oahu Beach & Country Homes, Ltd.*, 17 T.C. 1472 (1952). In these cases the sale of the property was made after liquidation or dissolution by the stockholders or their agents. The sale was not made by the corporation since it had no further rights or powers with the property. In the *Telephone Directory Advertising Co.* case, *supra*, the court said:

> . . . In the instant case the plaintiff (corporation) did not have any control over the asset that produced the income after its distribution to the stockholders on October 31, 1950. The plaintiff did not realize the income because it was not in existence when it accrued and was paid. (p. 889.)

Under Hawaii law, after dissolution a corporation performs no further acts and it has no control over the assets, title to which is in the trustee. The trustee

acts for the creditors and stockholders. It is inconceivable that by any administrative determination a dissolved corporation could be taxed on the sale of assets belonging to the creditors and stockholders and in the hands of a trustee. The decision of the Court of Appeals for the Sixth Circuit in the *Cold Metal Process Co.* case stands for the proposition that a nonexisting taxpayer cannot be taxed.

This problem is not merely a matter of whether tax administration should tie itself to local concepts of entities (*United States v. Loo,* 248 F. 2d 765, 767). It is concerned with the power to tax something which does not exist. A corporation is a creature of the jurisdiction in which it is organized. It exists only by the law of such jurisdiction, and unless the law of the jurisdiction extends corporate life after dissolution, it no longer exists. 16 Fletcher, *Cyclopedia of Corporations* (Perm. Ed.) Sec. 8113.

This case holds that the Commissioner of Internal Revenue by administrative action can make an entity, not in existence, subject to taxation. The Sixth Circuit held that this cannot be done (*Cold Metal Process Co., supra*). Congress has not taxed such entities, therefore they are not subject to taxation. This conflict between the Sixth and Ninth Circuits should be resolved by this Court.

II. THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The decision of the Court of Appeals erroneously interpreted Treasury Regulations 111, Sec. 29.22(a)-20. The distorted interpretation of the regulation has and will confuse administration of the Internal Revenue Code of 1939 in relation to dissolved corporations.

The interpretation by the Court below of the regulation is especially confusing when compared with its own earlier decision in *Commissioner of Internal Revenue v. Henry Hess Co.*, 210 F. 2d 553 (1954). In the present case, the Court of Appeals denied the petitioner's contention that the regulations applied only to the *usual* case in jurisdictions in which the life of a corporation is extended by statute for a period beyond the date of dissolution. See 16 Fletcher, *Cyclopedia of Corporations* (Perm. Ed.), Secs. 8113, 8166 *et seq.* The Court by interpolation held that the regulation applies to trustees in dissolution in all cases, whether or not corporate life is extended beyond dissolution, and not just the usual case.

In the *Henry Hess Co.* decision, *supra,* the court considered the same regulation and noted:

> . . . As indicated by the phrase of its title, "corporation in liquidation," this regulation describes the *usual* occurrence of a corporation continuing in business for the purpose of liquidating its retained assets and winding up its affairs for dissolution. In the instant case, the Steamship Company was not in liquidation but was fully wound up, it had no assets to liquidate,

> and all its debts had been paid on December 30, 1942. This is not the *usual* case contemplated by this regulation. There was no need for, nor were there any, "receivers, or trustees in dissolution" for the above purposes who did "stand in the stead of the corporation" after December 30, 1942. (p. 559.)

Thus in a previous decision the Court held that the regulation applied only to the *usual* case and not to all cases.

Under Revised Laws of Hawaii 1945, Secs. 8352, 8354-8357, upon dissolution, title to all of the corporate assets is no longer in the corporation, which no longer exists, but in a trustee acting for the directors and stockholders of the dissolved corporation. This is not the usual "trustee in dissolution" found in other jurisdictions. He does not "stand in the stead of the corporation," which no longer has any assets to liquidate, but he acts on behalf of the creditors and stockholders. His acts are not in the corporate name, but in his own name "for creditors and stockholders of the corporation dissolved" (Revised Laws of Hawaii 1945, Sec. 8355).

The decision of the Court of Appeals permits the Commissioner of Internal Revenue to tax entities which are not in existence, and to levy a tax upon income which was neither accrued nor earned while the entity was in existence. Settlement of the questions by this Court is in the public interest, since they concern not only the interpretation of a regulation promulgated under the Internal Revenue Code, but

also the power of the Commissioner to choose for taxation subjects which are not contemplated by the internal revenue laws. It is submitted that these are important questions of Federal tax law which should be settled by this Court.

CONCLUSION.

This case involves important questions arising under the internal revenue laws, questions upon which two Courts of Appeals are in direct conflict. The interpretation of the Court below is clearly wrong. It permits the Commissioner of Internal Revenue to collect a tax upon an entity which was not existent at the time the income was earned or accrued. It in fact sanctions levying an income tax by administrative fiat without the authority of any act of Congress. For the foregoing reasons, this petition should be granted.

Dated, Honolulu, Hawaii,
March 1, 1958.

Respectfully submitted,
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ROBERTSON, CASTLE & ANTHONY,
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(Appendices A, B, C and D Follow.)

Appendix A

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . .

. . . . . .

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 52. CORPORATION RETURNS.

(a) Requirement.—Every corporation subject to taxation under this chapter shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe. . . . In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of

such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

. . . . . .

(26 U.S.C. 1952 ed., Sec. 52.)

Revised Laws of Hawii 1945: Sec. 8352:

Voluntary dissolution; certificate; notice; authority of treasurer. Any corporation wishing to dissolve itself at any time before the expiration of its charter or articles of association, or within two years after such expiration, may present to the treasurer a petition requesting dissolution, together with a sworn certificate, signed by the president and secretary of the corporation, or by the presiding officer and secretary of the meeting at which the vote was taken, setting forth that the dissolution has been approved, at a meeting duly called for that purpose, by the holders of not less than three-fourths of the issued and outstanding shares of each class of its stock, even though their right to vote be otherwise restricted or denied by the charter, articles of association, by-laws or resolution of the corporation, or in the case of a nonstock corporation, by the vote of not less than three-fourths of the members present at said meeting.

Notice. In order to secure the attendance or representation by proxy of shareholders holding a sufficient number of shares at the meeting called for the purpose of approving the proposed dissolution of a corporation, due and diligent search for shareholders may be made by mailing the notice of the said meet-

ing by registered mail to each stockholder at his latest address of record on the books of the corporation, and by publishing notice of the meeting in some newspaper of general circulation published in the Territory at least once in each of two successive weeks (two publications) naming each shareholder of the corporation, and after such mailing and publication each shareholder who fails to attend said meeting and also fails to acknowledge said notice shall be deemed to have approved at said meeting the dissolution of the corporation.

Treasurer's action. The treasurer shall enter the petition and certificate of record in his office and after publication of notice of the proposed dissolution in some newspaper of general circulation published in the Territory at least once in each of three successive weeks (three publications) shall proceed to consider the same, and when satisfied that the vote certified has been duly taken, shall declare the corporation then dissolved unless the corporation shall, at the time of filing the petition, have requested that said dissolution shall become effective on or as of some subsequent date, in which case said dissolution shall become effective on or as of the requested date.

Sec. 8354:

Proceedings after dissolution; appointment of trustees. Upon the dissolution of a corporation, whether voluntary or involuntary (unless some other person or persons shall be appointed by the legislature, the treasurer, or by some court of competent authority) the directors or managers of the corporation, by what-

ever name known in law, shall be trustees for creditors and stockholders of the corporation dissolved, with full powers to settle the affairs of the corporation.

Sec. 8355:

Trustee; powers, liabilities, duties. The title to all assets and property, real, personal and mixed, belonging to any such corporation shall, immediately upon the dissolution thereof, unless by decree of court of competent jurisdiction it is otherwise ordered, vest in such trustee or trustees for the creditors and stockholders of the corporation dissolved.

Under the name of the trustee or trustees of the corporation dissolved (or under the name of the survivors of said trustees), unless and until some other person or persons be appointed by some court of competent jurisdiction, the said trustee or trustees shall have power: To sue for and collect the debts, claims and demands due to the corporation, or compound and settle any claims as they may deem best; to have, hold, reserve, sell and dispose of property, real, personal and mixed; to adjust and pay all debts of the corporation dissolved; to proceed as speedily as practical to a complete winding up of the corporation and, to that end, to exercise all powers of such dissolved corporation; to file bills for instructions in any court of competent jurisdiction on any matters concerning the administration of the assets under their control; to divide among the stockholders moneys and other properties that shall remain after paying the debts and necessary expenses; and they shall be jointly and severally liable to the creditors and to the stockholders

to the extent of the corporation property which shall come into their hands.

The corporation may enter into a contract or agreement with any person or persons who are requested by the corporation to act as trustee or trustees, covering the administration of the assets and properties of the corporation, and if such persons be appointed trustees as herein provided such contract shall in all respects be effective and shall be binding upon the corporation to the full amount of the assets coming into the hands of said trustees, *provided* that no such contract shall prejudice the rights secured by law to the creditors of the corporation.

Sec. 8356:

Claims, administration, accounts, commissions; notice to creditors. The trustees for dissolved corporations shall forthwith publish, once in each of four successive weeks (four publications) in some newspaper of general circulation published in the Territory, a notice to all creditors of the corporation to present their claims, at a place designated in the notice, within ninety days from the first publication of the notice, and shall, within thirty days from the publication of the notice, mail, postage prepaid, a like notice to every creditor whose name and address is known to the trustee or trustees and who has not, prior to the mailing of such notice, presented his claim. All claims not so presented shall be forever barred. The trustees, with the approval of the treasurer, may omit the publication of such notice if the assets of the corporation are insufficient to pay for such publication.

Accounts of trustees; fees, etc. The trustees for dissolved corporations shall render and file in the office of the treasurer within one year after their appointment or within sixty days after making a complete distribution of the assets to the creditors and stockholders, whichever date is earlier, an itemized account, on oath, showing all receipts and disbursements. In the event that such complete distribution has not been made then, unless the treasurer shall extend the time for filing the account, the trustees shall file an interim account and shall be required to file such further interim accounts and a final account at such time as the treasurer shall determine. The treasurer may for good cause shown extend the time for filing of any account and in the event an account is not filed within thirty days after notification by the treasurer that the account is due, any stockholder or creditor may file a petition in the circuit court at chambers, in equity, of the judicial circuit in which such corporation has its principal office or in the first judicial circuit, praying the court to require said trustees to account for all assets and properties coming into their hands. If the court shall determine that the failure to file said account was wilful, the cost of such suit shall be taxed against the trustees in their personal capacity.

Nothing herein shall be construed to prevent any stockholder or creditor from filing in any court of competent jurisdiction a suit for such relief as may be proper in the event that any account filed shall be improper or unsatisfactory. No account shall require the approval of the treasurer but shall be a public

document open to the inspection of all interested parties.

The trustees for dissolved corporations shall, in the absence of a contract or agreement entered into by the trustees providing for a greater or lesser amount, be entitled to the fees and commissions provided for trustees by the provisions of section 9757; *provided,* however, that in the event that there are insufficient assets to pay all of the claims of the creditors, the treasurer shall, after providing an opportunity for a hearing at which any interested creditor may appear, fix the fees and commissions collectible by the trustee, which fees and commissions may be fixed at a sum less than that provided for in section 9757 or provided for in any such contract or agreement. If in the case of involuntary dissolutions there are insufficient assets in the estate to pay the trustee the reasonable value of his services, the treasurer may allow and pay to such trustee out of any available appropriation for the current expenses of the treasurer's office, a fee of not more than twenty dollars.

Sec. 8357:

Tax, etc., clearance as prerequisite for certificate of dissolution of corporation. No certificate showing the allowance of the dissolution of any corporation organized or acting under the laws of the Territory shall be allowed or issued by any governmental authority in the Territory until and after the presentation of a valid certificate showing that all of the taxes, imposts, license fees and assessments theretofore levied upon, due and payable by the corporation to the Ter-

ritory or any of its municipal divisions, have been fully paid and discharged, or until the officers of the corporation shall file with the treasurer satisfactory evidence showing that all such taxes, imposts, license fees and assessments will be paid out of the assets and properties of the corporation, or until the said officers shall furnish a good and sufficient undertaking of some corporation, firm or person satisfactory to the treasurer that all such lawful taxes, imposts, license fees and assessments will be paid; *provided,* however, that this section shall not apply to certificates issued in accordance with section 8353.

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.22(a)-20. *Gross Income of Corporation in Liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. But see section 44(d) and section 29.44-5. (See further section 29.52-2.)

Sec. 29.52-1. *Corporation returns.*—Every corporation not expressly exempt from tax must make a re-

turn of income, regardless of the amount of its net income. In the case of ordinary corporations, the return shall be on Form 1120. For returns of insurance companies, see sections 29.201-1, 29.204-1, and 29.207-1; of foreign corporations, see section 235; and of affiliated corporations, see section 141 and section 29.141-1. A corporation having an existence during any portion of a taxable year is required to make a return. If a corporation was not in existence throughout an annual accounting period (either calendar year or fiscal year), the corporation is required to make a return for that fractional part of a year during which it was in existence. A corporation is not in existence after it ceases business and dissolves, retaining no assets, whether or not under State law it may thereafter be treated as continuing as a corporation for certain limited purposes connected with winding up its affairs, such as for the purpose of suing and being sued. If the corporation has valuable claims for which it will bring suit during this period, it has retained assets, and it continues in existence. A corporation does not go out of existence if it is merely turned over to receivers or trustees who continue to operate it. A corporation which has received a charter, but has never perfected its organization, which has transacted no business and had no income from any source, may upon presentation of the facts to the collector be relieved from the necessity of making a return as long as it remains in an unorganized condition. In the absence of a proper showing to the collector such a corporation will be required to make a return. For information returns by corporations contemplating dissolution or liquidation, see section

148(d). For information returns by corporations of distributions in liquidation, see section 148(e). For information returns by corporations relating to profits of the taxable year declared as dividends, see section 148(b). For verification of returns and use of prescribed forms, see sections 29.51-4 and 29.51-5.

Sec. 29.52-2. *Returns by Receivers.*—Receivers, trustees in dissolution, trustees in bankruptcy, and assignees, operating the property or business of corporations, must make returns of income for such corporations. If a receiver has full custody of and control over the business or property of a corporation, he shall be deemed to be operating such business or property within the meaning of section 52, whether he is engaged in carrying on the business for which the corporation was organized or only in marshaling, selling, and disposing of its assets for purposes of liquidation. Notwithstanding that the powers and functions of a corporation are suspended and that the property and business are for the time being in the custody of the receiver, trustee, or assignee, subject to the order of the court, such receiver, trustee, or assignee stands in the place of the corporate officers and is required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control. (See sections 274 and 298 and sections 29.274-1 and 29.274-2.) A receiver in charge of only part of the property of a corporation, however, as, for example, a receiver in mortgage foreclosure proceedings involving merely a small portion of its property, need not make a return of income.

Appendix B

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

(1) C. & M. McCarthy, Limited was a corporation organized and incorporated under the laws of the Territory of Hawaii, engaged in business in Honolulu, City and County of Honolulu, in said Territory. It owned and operated the Donna Hotel and the Waikiki Apartments.

(2) On or about October 31, 1944, several individuals made an offer to C. & M. McCarthy, Limited to purchase the Donna Hotel for $325,000, and made a deposit of $15,000. This offer of purchase was rejected by the corporation.

(3) Said individuals then accepted an offer by the stockholders of the corporation to sell all of the corporate stock for $400,000. Said individuals deposited the sum of $15,000 toward the purchase price and entered into a contract to buy all of the capital stock of the corporation. At that time the purchasers had been assured by real estate brokers that the Waikiki Apartments could be sold for $75,000.

(4) On January 23, 1945, the stockholders of C. & M. McCarthy, Limited duly voted to dissolve said corporation as of the close of business on February 15, 1945, in the manner required by law, and to request the Treasurer of the Territory of Hawaii to

appoint C. T. Loo as Trustee in Dissolution for the creditors and stockholders of C. & M. McCarthy, Limited, on such dissolution.

(5) Such petition was thereafter duly filed with the Treasurer of the Territory of Hawaii pursuant to the provisions of Section 8352 et seq., Revised Laws of Hawaii 1945.

(6) On February 16, 1945, said Treasurer issued his decree of dissolution of said corporation effective February 15, 1945. A copy of said decree is Plaintiff's Exhibit 1 in evidence.

(7) On February 16, 1945, the said Treasurer duly appointed said C. T. Loo, Trustee in Dissolution for the creditors and stockholders of C. & M. McCarthy, Limited, a dissolved corporation. A true copy of said order is Plaintiff's Exhibit 2 in Evidence.

(8) After dissolution, the property known as the Waikiki Apartments was in the possession and control of plaintiff as Trustee, and plaintiff, as such Trustee, sold the Waikiki Apartments on February 19, 1945, for the sum of $75,000. The purchaser paid the price by check made payable to C. T. Loo, Trustee for the creditors and stockholders of C. & M. McCarthy, Limited, a dissolved corporation.

(9) The adjusted cost basis of the Waikiki Apartments was $20,849.30.

(10) Plaintiff did not include the gain from the sale of the Waikiki Apartments in the final income tax return filed by C. & M. McCarthy, Limited. This return was filed for the period January 1, 1945 to

August 31, 1945. The Bureau of Internal Revenue, on examination of said return, included the gain from the sale of said property in the corporation's taxable income and assessed a capital gains tax of $13,173.20 against C. & M. McCarthy, Limited, c/o C. T. Loo, Trustee in liquidation.

(11) Plaintiff, as Trustee in dissolution for the creditors and stockholders of C. & M. McCarthy, Limited, executed a waiver of restrictions on assessment and collection of deficiency in tax, Form 870, for $13,173.20, plus interest of $3,622.63 to June 15, 1950, or a total of $16,795.83, and issued his check as such Trustee for that amount, for which he was given a receipt as such Trustee.

(12) On May 15, 1952, plaintiff claimed a refund for said amount of $16,795.83, together with interest thereon. A copy of said claim for refund is Plaintiff's Exhibit 3 in evidence.

(13) On August 31, 1953, S. B. McKenney, District Director of the Internal Revenue Service, by registered mail, gave notice of disallowance in full of the aforesaid claim for refund.

(14) Although demand has been made therefor, no part of said $16,795.83 has been paid, refunded or credited to plaintiff by defendant.

Conclusions of Law

(1) Under Section 8352 of the Revised Laws of Hawaii 1945, a corporation is dissolved when declared to be dissolved by the Treasurer of the Territory of

Hawaii and the corporate existence is not continued for any purpose.

(2) Upon dissolution, title to all assets and property which theretofore belonged to the corporation vests in the trustee for the creditors and stockholders of the corporation dissolved.

(3) The trustee is empowered to do all acts necessary to effect a proper and equitable distribution of the property to the creditors and stockholders in his own name.

(4) The trustee is personally liable to the creditors and stockholders to the extent of the corporation property which comes into his hands.

(5) The trustee must file his accounts with the Treasurer of the Territory of Hawaii, and if he fails to do so, any creditor or stockholder may force him to account in the Circuit Court in the same manner as any other trustee.

(6) He is entitled to fees for his trusteeship in the same manner as trustees of private trusts.

(7) No corporation is permitted to dissolve in the Territory until it shall first have discharged its obligation for all taxes, imposts, license fees and assessments due and payable by the corporation to the Territory or any of its municipal subdivisions.

(8) The method of dissolution of corporations in the Territory of Hawaii is not the method usually adopted by the various states, for the reason that the corporate existence is not continued for the purpose of liquidating assets and paying debts. The trus-

tee in dissolution does not stand in the stead of the corporation but acts independently as a fiduciary for the creditors and stockholders. Regulations 111, Section 29.22(a)-20 is therefore not applicable to the sale of the Waikiki Apartments by C. T. Loo, Trustee in dissolution for creditors and stockholders of C. & M. McCarthy, Limited, a dissolved corporation. C. & M. McCarthy, Limited, was no longer in existence at the time of the sale, and C. T. Loo was acting for the creditors and stockholders and not for the non-existent corporation.

(9) Regulations 111, Section 29.52-2, does not make the sale of the Waikiki Apartments by C. T. Loo taxable to the corporation. That section requires that certain persons who are vested with the powers to operate the property or business of the corporation must make the corporate income tax return. The regulation adopts the categories set forth in Section 52 of the Internal Revenue Code of 1939, that is, receivers, trustees in bankruptcy and assignees, all of whom operate the business of the corporation which remains in existence. The regulation adds the category of trustees in dissolution. Section 29.52-2 is in pari materia with Section 29.22(a)-20. The latter section contemplates the usual mode of dissolution of a corporation and Section 29.52-2 requires that such trustees operating the continuing business of the corporation, must make the corporate tax return. Since the corporate existence ends for all purposes in the Territory of Hawaii when the Treasurer declares the corporation to be dissolved, this section is not here applicable.

(10) Plaintiff being a true trustee for certain classes of beneficiaries, he cannot be taxed as an association either under Section 3797, Internal Revenue Code of 1939, as suggested by defendant, or under Regulations 111, Section 29.52-2.

(11) Plaintiff's claim for refund in the amount of $16,795.83, together with interest thereon, should have been granted and judgment will enter for plaintiff nunc pro tunc as of May 16, 1956, for the sum of $16,795.83, plus interest from June 15, 1950, at the rate of 6% per annum.

Dated, Honolulu, Hawaii, May 28, 1956.

/s/ J. Frank McLaughlin,
Judge of the Above-Entitled Court.

Receipt of copy acknowledged.

(Endorsed:) Filed May 28, 1956.

United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,* vs. C. T. Loo, Trustee in Dissolution for the Creditors and Stockholders of C. & M. McCarthy, Ltd., a Dissolved Corporation, *Appellee.*	No. 15,237 Oct. 10, 1957

Appeal from the United States District Court
for the District of Hawaii

Before: HEALY, FEE and CHAMBERS, Circuit Judges.

CHAMBERS, Circuit Judge.

A sale of real estate by an Hawaiian trustee (of a corporation) in dissolution for the benefit of creditors is made at a gain over the late corporation's cost basis. Is this "profit" taxable income (a capital gain) to the trustee or should the transaction be treated as that of a sale by the stockholders in their individual right as if they had finally received the property in distribution on liquidation? That is our question here when the trustee has paid the taxes under protest and sued in district court to recover the amount which he has

paid. The district court ruled in favor of the trustee and the United States appeals.

C. & M. McCarthy, Ltd., was a corporation organized under the laws of the Territory of Hawaii. In 1944 it owned (and presumably operated) in Honolulu the Donna Hotel and the Waikiki Apartments. Over three-fourths of the value of the two was in the Donna, but our primary concern here is with the Waikiki on which, in 1944, there was an appreciation in value over the company's cost basis.

It seems reasonable to say that purchasers and sellers probably had tax consequences in mind when they tailored the forms of their transactions here under review.

Late in 1944 the appellee, C. T. Loo in his individual capacity, was one of a group that wanted to acquire the Donna. The then stockholders of C. & M. McCarthy, Ltd., were unwilling to sell the Donna as a pure real estate sale for the offered price of $325,000, but they were willing to sell all of the stock of the company to Loo's associates for $400,000. Practically, this would pass ownership of both the Waikiki and the Donna. With assurance that the Waikiki, which Loo and his associates did not want, could be resold for $75,000, all of the stock was sold and transferred by the old owners to the Loo group in January, 1945. The cost basis of C. & M. McCarthy, Ltd., on the Waikiki was $20,849.30.

With Hun Yun Yei, a non-associate, ready to buy Waikiki for $75,000, the Loo associates by appropriate resolution dissolved the McCarthy company on Feb-

ruary 15, 1945. The following day, February 16, the treasurer of the Territory of Hawaii issued his decree of dissolution and appointed C. T. Loo as trustee in dissolution for the creditors and stockholders of the company. Three days later Loo, as trustee, sold Waikiki[1] to Hun Yun Yei for $75,000 cash. Had the sale been made by the corporation while fully alive, it should be agreed that the capital gains tax was $13,122.20.[2]

When Loo as trustee made the final return for the corporation he did not report any taxable gain on the Waikiki. His position was that he really sold the property for the stockholders (in their individual capacities) of the dissolved company. Internal Revenue maintained that the transaction was taxable to the dissolved corporation and that Loo as trustee should pay the tax. The district court was of the view that the trustee was not in his trust capacity concerned with the tax and granted full recovery to the trustee for the taxes paid under protest. This court disagrees and sustains the Internal Revenue Service.

This is a case under the 1939 Internal Revenue Code, 26 U.S.C.A. Primarily we are concerned with §52 of that code and §29.22(a)-20 of Treasury Regulations 111 promulgated under the 1939 Code. This sub-section of the regulations reads as follows:

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[1]On or about August 31, 1945, Loo as trustee distributed the Donna to the stockholders. Presumably they took title as tenants in common. No income tax problems are here presented concerning the Donna.

[2]If the government must repay the tax paid under protest, then also more than $3,600 in interest is due the taxpayer—trustee.

Gross Income of Corporation in Liquidation.—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. But see section 44(d) and section 29.44-5. (See further section 29.52-2.)

Inherent in the taxpayer's position is the premise that on February 19, 1945, under Hawaiian law C. & M. McCarthy, Ltd., was dead—dead as anything could be; that for corporate taxation to be effective there must be some flicker of life left at the time a transaction is made.

This is generally a time when by statute corporations in passing to the corporate graveyard are kept in a twilight or comatose condition for a period of time, neither dead nor alive. In this interim creditors and stockholders come to the deathbed by invitation and the tax gatherer comes uninvited to draw for the last time.

The district judge was impressed with the finality of an order in dissolution under Hawaiian law. The government on the other hand points to certain sec-

tions in the Hawaiian statutes which he says are inconsistent with absolute corporate death. This court on a close question of Hawaiian law should indulge every presumption in favor of him who lives with Hawaiian law every day. This court does not intend herein to set aside his concept of when the Hawaiian company in the hands of a trustee dies.

There is good argument that Congress in tax legislation should tie itself to local concepts of entities.[3] But that is a matter of legislative policy. It has long been settled the federal government can remold the types of kettles before it puts its long handled spoon in them.[4]

There are many decisions which labor earnestly to find some spark of life in the corporation while it is in the hands of a trustee in dissolution.[5] Then much attention is devoted to construing §29.22(a)-20.[6] The second sentence says: "The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes." Is the sentence merely a recital of what is usually the state law, or does it establish something affirmatively?

Let us go through the section sentence by sentence.

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[3]Against such a thesis is the other one that taxes among the states and territories ought to be uniform and should not have different results solely on the basis of a local quirk of statute.

[4]See United States v. Kintner, 9 Cir., 216 F.2d 418, 424.

[5]Taylor Oil & Gas v. Commissioner, 5 Cir., 47 F.2d 108, Burnet v. Lexington Ice & Coal Co., 4 Cir., 62 F.2d 906; and Northwest Utilities Securities Corp. v. Helvering, 8 Cir., 67 F.2d 619.

[6]First National Bank of Greeley v. United States, 10 Cir., 86 F.2d 938.

The first sentence: "When a corporation is dissolved its affairs are usually wound up by a receiver or trustees in dissolution." Comment: This obviously is a recital pointed at local law.

Now, (repeating) the second sentence: "The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes." Comment: Two interpretations are possible. It may be a pure recital such as: "[Usually] [t]he corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes." Or, it may have operative force within its words and mean, in effect: "[I, the Commissioner of Internal Revenue, for the Secretary of Treasury, hold irrespective of local law that] [t]he corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes."

The third sentence: "Any sales of property by them [trustees in dissolution] are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss." Comment: This third sentence is all important. If the second sentence is operative, as the government contends, of course it reaches Mr. Loo as trustee. If the second is a recital, then in this court's judgment the third sentence reaches Mr. Loo as trustee. "Sales of property by *them*[7] in dissolution"

[7]Emphasis supplied.

refers to "a trustee or receivers in dissolution." The third sentence stands and can stand on its own feet. Any recitals in the first and second sentence would not seem to vitiate the plain meaning of the third sentence.

The taxpayer makes a strong argument that the regulation, §29.22(a)-20 of Treasury Regulations 111, is addressed to §52 of the 1939 Internal Revenue Code; the code section is simply one on who should file returns; and therefore code section and regulation section are in pari materia with the scope of the regulation being no broader than the single code section itself. This court rejects the argument. There may be an argument that fixing of liability was badly placed in §29.22(a)-20, but this court's view is that this sub-section does purport to fix or define liability for taxation. Consequently the sweep of the regulation extends right back to §22(a) of the Internal Revenue Code of 1939, the section and subdivision defining gross income.

The regulation here goes back at least to 1926.[8] As a freshly made regulation, it would seem to be within the scope permissible under the basic statutes. The passage of time with subsequent reenactments of the revenue statutes, all with full knowledge of the Congress, strengthens the regulation.

Judgment reversed.

(Endorsed:) Opinion. Filed Oct. 10, 1957.

Paul P. O'Brien, Clerk.

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[8]Article 548, Treasury Regulations 69, under the Internal Revenue Act of 1926; also, Article 71, Treasury Regulations 74, under the Internal Revenue Act of 1928.

Appendix C

United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,* vs. C. T. Loo, Trustee in Dissolution for the Creditors and Stockholders of C. & M. McCarthy, Ltd., a Dissolved Corporation, *Appellee.*	No. 15,237

JUDGMENT

Appeal from the District Court for the District of Hawaii.

This cause came on to be heard on the Transcript of Record from the District Court for the District of Hawaii, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed.

(Endorsed:) Judgment. Filed and entered October 10, 1957.

Paul P. O'Brien, Clerk.

Appendix D

Supreme Court of the United States

OCTOBER TERM, 1957

No.

C. T. Loo, Trustee in Dissolution for the Creditors and Stockholders of C. & M. McCarthy, Ltd., a Dissolved Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 8, 1958.

/s/ Wm. O. Douglas,
Associate Justice of the Supreme
Court of the United States.

Dated this 7th day of January, 1958.